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No. 91-255

Supreme Court, U.S.

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In The
Supreme Court of the United States

October Term 1991

JOHN BOURGUIGNON AND
CYNTHIA BOURGUIGNON,

Petitioners,

v.

HOLIDAY INNS OF AMERICA, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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CASES

Truax v. Corrigan, 257 U.S. 312, 42 S.Ct. 124, 66	
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ARGUMENT

PETITIONERS ASSERTED THEIR DUE PROCESS AND EQUAL PROTECTION CLAIMS IN THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT BOTH ON DIRECT APPEAL AND AGAIN ON PETITION FOR REHEARING

Respondent is mistaken in its argument claim that petitioners failed to raise below their contention that they were denied access to Missouri courts on an equal basis with Missouri citizens so that the contention is newly raised by the petition for certiorari (Respondent's Brief, 11).

To the contrary, as soon as petitioners were cast below in the federal district court without a trial on the merits because of the state court dismissal without a trial on the merits, petitioners asserted that they are denied Fourteenth Amendment due process of law in their brief on appeal to the Court of Appeals for the Eighth Circuit (Appendix I)

Respondent has overlooked or disregards the history and breadth of the plea of denial of due process as it bears on the denial of access to the courts. That history and breadth plainly is chronicled in *Truax v. Corrigan*, 257 U.S. 312, 331, 42 S.Ct. 124, 127, 66 L. Ed. 254 (1921), cited and relied on by petitioners in their Petition for Certiorari as precedent for looking behind apparent pure decisions of state law to perceive and remedy the denial of fundamental federal constitutional guarantees.

The *Truax* court wrote that the due process clause of the Fourteenth Amendment is descended from the Magna Charta. The Fourteenth Amendment due process clause

imposes the ancient due process of law requirement (which always has bound the federal government) on the states. On the other hand, the equal protection clause did not exist prior to the Fourteenth Amendment and does not control the federal government. In amplification the *Truax* court wrote of the due process clause, *id.*, 257 U.S. 331, 42 S.Ct. 129, 66 L.Ed. 332:

"The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. *Hurtado v. California*, 110 U.S. 516, 535, 4 S. Ct. 111, 28 L.Ed. 232. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty, and property, which the Congress or the Legislature may not withhold."

With respect to access to the courts, the equal protections clause constitutes "further assurances"; the due process clause itself restates the fundamental right to have meaningful access to the courts. Petitioners did raise their claim of denial of due process of law, below. (Appendix I and II)

Respondent's argument suggestion (Respondent's Brief, 14) that petitioner's extra-judicial attempts to settle their claims with another tortfeasor is a ground to deny petitioners due process of law access to the courts has no

foundation either in logic or in law. Respondent cites no authority for such a bizarre argument. There is none.

CONCLUSION

Petitioners respectfully request that this Court issue a Writ of Certiorari.

Respectfully submitted,

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APPENDIX I
IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2147WM

JOHN BOURGUIGNON AND
CYNTHIA BOURGUIGNON

APPELLANTS

V.

HOLIDAY INNS, INC.

APPELLEE

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION
HONORABLE D. BROOK BARTLETT

OPENING BRIEF OF APPELLANTS
JOHN BOURGUIGNON AND
CYNTHIA BOURGUIGNON

(Filed Sep. 11, 1990)

[Brief Points I and II are omitted.]

III.

WHERE PLAINTIFF APPELLANTS NEVER HAVE HAD A HEARING ON THE MERITS OF THEIR TORT AND FRAUD CLAIMS AGAINST DEFENDANT APPELLEE BEFORE ANY TRIBUNAL AND THE DISMISSAL OF THEIR STATE COURT ACTION AGAINST APPELLEE BY THE STATE COURT DENIED TO THE PLAINTIFFS ANY HEARING ON THE MERITS AND, THUS, DENIED PLAINTIFFS DUE PROCESS OF LAW UNDER BOTH THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE MISSOURI CONSTITUTION, CAN THE DISTRICT COURT NOW DENY TO PLAINTIFFS A TRIAL ON THE MERITS SOLELY ON THE PRECLUSIVE EFFECT WHICH THE DISTRICT COURT CHOOSES TO GIVE TO THE STATE COURT JUDGMENT OF DISMISSAL?

Although the district court is required to give full faith and credit to the judicial proceedings of Missouri, Title 28, U.S.C. § 1738, the district court **cannot give any effect** to the judicial proceedings of Missouri which deny to these plaintiffs due process of law under the Fourteenth Amendment to the Constitution of the United States. See, **Kremer v. Chemical Construction Corp.**, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982), 456 U.S. 482; 102 S.Ct. 1898:

"The State must, however, satisfy the requirements of the Due Process Clause. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment. * * * In such a case there could be no constitutionally recognizable preclusion at all."

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Requirements for the due process of law to **which plaintiffs are entitled** are promulgated by controlling decisions of the Missouri Supreme Court en Banc (the highest court of Missouri) as it obeys the constitutional mandate that plaintiffs' rights to jury trial of their claims against Holiday Inns "shall remain inviolate". That constitutional guarantee of a jury trial of plaintiffs' claims against joint and several tortfeasor Holiday Inns **CAN-NOT** be denied to plaintiffs by the intermediate Missouri court's decision of [**Bourguignon II**], **Bourguignon v. Thirteen-Fifty Investment Co.**, 759 S.W.2d 300 (Mo.App. 1988).

The due process of law which has been embedded in the law of Missouri for the protection of victims of the torts of joint and several tortfeasors has been explicated in **Page v. Freeman**, 19 Mo. 421 (1854) and in **Arana v. Koerner**, 735 S.W.2d 729 (Mo.App. 1987) both of which are fully considered in the argument of Issue I which we adopt here by reference without fully restating it. Suffice it to say here, due process of law under the established law of Missouri requires a jury trial on the merits of plaintiffs' claims against defendant Holiday Inns, a due process right which was denied to plaintiffs by **Bourguignon II** and which is denied here by the district court.

Plaintiffs have had **NO** hearing on the merits of their claims before **ANY** tribunal.

The **hearing** before an impartial tribunal which is required as an essential element of due process of law in this case is a constitutional trial on the merits of plaintiffs' claims before a jury. The Constitution of Missouri

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requires it and the controlling case law from the highest court in the state requires it.

The state's denial of a jury trial of plaintiffs' claims against Holiday Inns simply because plaintiffs COULD have sued Holiday Inns with Thirteen-Fifty in **Bourguignon I** is a denial of due process of law. The district court's finding that, since the state permitted plaintiffs to **argue about the denial of a jury trial ON APPEAL**, plaintiffs were afforded the due process of law **hearing** which is required by the constitutions is legally and logically untenable. Jury trial does not mean an argument on appeal. The due process right to notice, opportunity to prepare and to fully and fairly be heard does not mean a **hearing on appeal**.

Denial of a constitutionally guaranteed trial is a denial of due process of law.

A denial of due process of law required under state law automatically is a denial of due process of law under the guarantees of the Fourteenth Amendment to the Constitution of the United States as it controls the States.

The district court cannot deny to plaintiffs the due process of law which the Fourteenth Amendment to the Constitution of the United States demands – for any reason – and expressly not because of the preclusive effect the district court gives to the state court's denial of due process of law to plaintiffs in the state courts. **Kremer v. Chemical Construction Corp., supra.**

Plaintiffs are entitled to a trial on the merits. The district court has erred.

APPENDIX II
IN THE UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

JOHN BOURGUIGNON AND)	
CYNTHIA BOURGUIGNON,)	
)	Case No.
Appellants,)	90-2147-WM
)	
v.)	
)	
HOLIDAY INNS OF AMERICA,)	
INC.,)	
)	
Appellee.)	

PETITION FOR REHEARING

(Filed Apr. 3, 1991)

COME NOW appellants and petition for a rehearing pursuant to F.R.A.P. 40 and 8th Cir. R. 40(a) on the ground that, by mistake or oversight, this court's summary affirmance of the trial court's dismissal of appellants' action constitutes this court's own denial of due process and equal protections of law to appellants.

Appellants are damaged victims of a joint tort committed by appellee and another. Appellants have received part payment from the other but have not been paid anything by this joint tortfeasor, appellee.

Appellants, step by step, have attempted to obtain a trial of their legal claims against the second joint tortfeasor, appellee, but at each step have been denied their constitutional rights to a trial.

This court's summary affirmance of the district court's dismissal of appellants' damage action without appellants ever having had a trial before any tribunal

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constitutes this court's own denial of due process and equal protections of law to appellants at this step of the proceedings in that:

the Missouri Constitution guarantees, *inter alia*, due process of law, that there shall be no wrong in Missouri without a remedy and that Missouri's courts shall be open to all, and

The Supreme Court of Missouri has declared that joint tortfeasors in Missouri have several liability for their joint torts and that a tort victim shall have a remedy from each such joint tortfeasor which can be prosecuted by individual actions brought against each without an action against one acting as a bar to an action against another such joint tortfeasor, and

the Missouri Court of Appeals has no jurisdiction or power to overrule or to refuse to follow the controlling decisions of the Supreme Court of Missouri, but, nevertheless, contrary to Missouri law and the Constitution of Missouri, affirmed the Missouri trial court's dismissal of appellants' action against joint tortfeasor, appellant, on mere motion to dismiss and without a trial.

Appellants have been denied due process and equal protections of law (under both the federal Fourteenth Amendment and the Constitution of Missouri by denial of a trial of their claim against appellee) in the Missouri trial court, in the Missouri Court of Appeals, in the United States trial court and now, have been denied due process and equal protection of law at this step by this court's judgment affirming the denial of a trial to appellants (a hearing on the merits) before any court.

WHEREFORE, appellants petition for a rehearing.

